

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK RAY)	
Claimant)	
)	
VS.)	
)	
A & A AUTO & TRUCK SALVAGE, INC.)	
Respondent)	Docket No. 1,041,284
)	
AND)	
)	
CORNHUSKER CASUALTY CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 23, 2010, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on November 9, 2010. The Acting Director, Seth Valerius, appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of retired Board Member Carol Foreman. R. Todd King, of Wichita, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant suffered a work accident but found he had no permanent impairment resulting therefrom. Claimant was awarded his temporary total disability benefits and previously paid medical expenses but no permanent partial disability compensation.

The Board has considered the record and adopted the stipulations listed in the Award. The Board has also considered the court-ordered independent medical examination (IME) report of Dr. Paul Stein filed with the Division on October 14, 2009.

ISSUES

Claimant requests review of the ALJ's finding that claimant suffered no permanent partial disability as a result of his work-related accident. Claimant argues that he is entitled

to a 15 percent permanent partial impairment pursuant to the rating opinion of Dr. George Fluter.

Respondent contends the decision of the ALJ is consistent with the credible evidence and should be affirmed.

The issue for the Board's review is: Did claimant suffer permanent partial disability as a result of his work-related accident of July 16, 2008?

FINDINGS OF FACT

Claimant worked for respondent demolishing automobiles. On July 16, 2008, he was injured when a 75-pound cutting gun¹ fell from a brace, hit him across his neck and right shoulder, and knocked him to the ground. His supervisor was near the scene when claimant was knocked down, and claimant asked him to call an ambulance. Claimant testified that his supervisor, however, told him to get up and clock out if he had been hurt. Claimant testified he went to the emergency room the same day, where he complained of right shoulder and neck pain. X-rays of the right shoulder showed no fractures or dislocations. A CT scan of the cervical spine showed no evidence of an acute fracture or dislocation of the cervical spine. Claimant was given a C-collar, a sling, and pain medication. He was diagnosed with right shoulder and neck pain, and was released.

Claimant was treated by Dr. George Watson from August 6 to September 26, 2008. He was seen by Dr. Pedro Murati on September 4, 2008, at the request of claimant's attorney. After examining claimant, Dr. Murati diagnosed him with myofascial pain syndrome affecting the right shoulder girdle extending into the cervical paraspinals. He recommended physical therapy, cortisone trigger point injections, and anti-inflammatory and pain medications.

Dr. John Estivo was authorized by respondent to examine and treat claimant. He first saw claimant on November 4, 2008, when claimant gave a history of a work-related accident in which he was injured when a piece of equipment fell. Claimant complained of pain in his right shoulder and the right side of his cervical spine. Dr. Estivo ordered x-rays of claimant's right shoulder. After his examination and review of the diagnostic studies, Dr. Estivo's impressions were that claimant had right shoulder pain and cervicgia with radiculopathy. He placed claimant on pain medication and anti-inflammatory medication, gave him temporary restrictions, and ordered MRIs of his right shoulder and cervical spine.

The MRI of the cervical spine revealed normal age-related degenerative changes at C5-6 and C6-7. The MRI of the right shoulder showed some mild, normal age-related degenerative changes to the AC joint, but no other abnormalities. When Dr. Estivo next

¹ The emergency room records indicate claimant said the cutting gun weighted 45 pounds.

saw claimant on November 20, 2008, he recommended physical therapy and continued the medications and restrictions. Dr. Estivo did not see claimant again until February 16, 2009. He again recommended physical therapy, continued his medications, and kept claimant's temporary restrictions. Dr. Estivo next saw claimant on March 2, 2009, at which time claimant stated he was improving and having less cervical and right shoulder pain.

Dr. Estivo last saw claimant on March 23, 2009. At that time, claimant stated to him that he was feeling much better. He denied any cervical spine pain and any right shoulder pain. Dr. Estivo performed a full musculoskeletal examination of claimant, including both upper and lower extremities as well as the cervical, thoracic and lumbar spine, and he said it was a completely normal examination. After the examination, Dr. Estivo's impression was that claimant had resolved cervical spine strain and resolved right shoulder rotator cuff tendinitis. Dr. Estivo found that claimant had reached maximum medical improvement and, based on the *AMA Guides*,² had a 0 percent impairment for his injury claim. His rating was primarily based on claimant's physical examination and the fact that he had full range of motion to his right shoulder. He also factored into the evaluation that claimant had no complaints at all. Dr. Estivo did not believe that claimant was in need of any permanent restrictions. He recommended that claimant follow certain exercises at home.

Dr. Estivo was told by respondent's attorney that claimant told Dr. Fluter on April 21, 2009, that on a scale of 0 to 10, his pain level was a 10. Dr. Estivo did not consider that to be a credible complaint. There was nothing about his last physical examination of claimant that would lead him to believe that within a few weeks claimant's pain complaint would go from asymptomatic to a level 10. During treatment, Dr. Estivo said claimant demonstrated a gradual decrease in symptoms in response to treatment consistent with what he would expect based on claimant's injury.

Dr. George Fluter, who is board certified in physical medicine and rehabilitation, evaluated claimant on April 21, 2009, at the request of claimant's attorney. Claimant gave Dr. Fluter a history of his accident and medical treatment.

In Dr. Fluter's examination, he noted claimant was in no acute distress. His gait looked normal. His neck range of motion was limited with pain in right lateral rotation. This would be a subjective test. Shoulder impingement testing was positive on the right and negative on the left. Dr. Fluter stated that the impingement testing was somewhat subjective in that the patient has to tell the doctor whether it is painful or causing a particular sensation. He tries not to clue the patient in as to what he is looking for. Claimant had tenderness to palpation over the right subacromial and bicipital tendon areas, as well as over the acromioclavicular joint on the right side. Dr. Fluter found tenderness to palpation associated with taut bands in the muscles of claimant's neck, upper back,

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

upper shoulders, and scapular stabilizers bilaterally, but more on the right. Dr. Flutter testified he took range of motion measurements of the shoulders, and there were some alterations.

After his examination and review of the records and history, Dr. Flutter opined that claimant had a work-related injury on July 16, 2008, and suffered neck and upper back pain which was related to cervicothoracic strain/sprain, as well as a myofascial pain component affecting the neck and upper back. There were findings of right shoulder pain, impingement, and contusion with possible internal derangement of the right shoulder. Claimant complained of numbness in the palm of his hand, but Dr. Flutter did not believe that had any relationship to the shoulder impingement.

Dr. Flutter said that as of April 21, 2009, claimant was at maximum medical improvement. He did not believe there was any additional diagnostic testing or treatment that would improve his situation. Based on the *AMA Guides*, he placed claimant in DRE Cervicothoracic Category II for a 5 percent permanent partial impairment to the whole body for the myofascial pain to his neck and upper back. Based upon the range of motion measurements of the right shoulder, he rated claimant as having a 17 percent permanent partial impairment to the right upper extremity at the level of the shoulder. Converting the right upper extremity impairment to a whole body equivalent, the 17 percent impairment would become a 10 percent whole body impairment, which, added to the 5 percent impairment for the cervical spine, would give claimant a total permanent partial impairment to the whole body of 15 percent.

Dr. Flutter placed permanent work restrictions on claimant. He said that claimant's lifting, carrying, pushing and pulling should be restricted to 35 pounds occasionally and 15 pounds frequently. Claimant should avoid holding his head and neck in awkward or extreme positions. He should restrict activities at or above shoulder level using the right arm to an occasional basis, and he should restrict activities greater than 24 inches away from the body using the right arm to an occasional basis.

On April 21, 2009, claimant rated his pain as a 10 on a 0 to 10 scale.³ Dr. Flutter testified that the pain level scale is an estimate because pain is always subjective. What Dr. Flutter thinks claimant was trying to say was that he was having a high level of pain. Although claimant was reporting his pain was a level 10, his outward appearance did not exhibit that he was in acute pain.

Claimant was evaluated by Dr. Paul Stein on October 9, 2009, at the request of the ALJ. Claimant gave Dr. Stein a history of his accident and medical care. He said he had

³ Although Dr. Flutter's medical report indicates that claimant reported having pain at a level 10 on a scale of 0 to 10, respondent's attorney, during Dr. Flutter's deposition, referred to claimant's report of being an 8 on a scale of 0 to 10. Flutter depo. at 27-28 and Ex. 2 at 3.

persistent pain in the right side of his neck and trapezius muscle. He said he had numbness and tingling in the mid-portion of the right palm. He said that on a scale of 0 to 10, his pain ranged from 7 to 8. Dr. Stein reviewed medical records from Dr. George Watson, Dr. Estivo and Dr. Flutter. He also reviewed claimant's x-ray films and MRI reports.

After the physical examination, Dr. Stein concluded that claimant likely sustained a soft tissue injury to the muscles around the right trapezius in the work incident of July 16, 2008. He found no indication of cervical nerve root compression. The MRI scan of claimant's right shoulder showed no significant intra-articular injury. Dr. Stein noted that the amount of claimant's complaints and the limitation of movement in his neck and right shoulder were out of proportion to the findings in the imaging studies and his physical examination. Dr. Stein found no evidence of muscular spasm or guarding. Dr. Stein said he found inconsistencies in claimant's medical records, complaints of pain and limitation of range of motion, and the findings from the physical examination. Therefore, he was unable to determine that the findings on his examination were valid and unable to determine that claimant, within a reasonable degree of medical probability, sustained a permanent impairment of function caused by the work injury.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d(a) states in part:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the

injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

....
(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be $66 \frac{2}{3}\%$ of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

ANALYSIS

Having considered the entire record, the Board agrees with the findings and conclusions of the ALJ. In this instance, the expert medical opinions of the treating physician, Dr. Estivo, and the court-ordered examiner, Dr. Stein, are more credible than the opinions of Dr. Flutter. The Board finds that claimant has failed to prove he has a permanent impairment of function that is rateable under the *AMA Guides*. As there is no

claim for a work disability, claimant is not entitled to receive permanent partial disability compensation.

CONCLUSION

Claimant does not have a rateable functional impairment under the *AMA Guides*. Therefore, claimant is not entitled to permanent partial disability compensation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated August 23, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge